on that point the judgment of the Federal Court was against the respondents. The letter continued:

"... In their case on the appeal the respondents had submitted that such a charge was not recognized by the law of Malaysia. Their Lordships heard no argument on this aspect of the appeal, having decided that it might be disposed of in accordance with the submission of the parties by reference to when the cause of action arose. The only question argued before and decided by their Lordships was whether the claim was statute-barred and it was in this connection only that the question of whether there was a valid charge securing the debt was relevant.

Their Lordships accordingly concluded that, in view of the dispute upon whether an equitable charge is recognized in Malaysia, it would be inappropriate to affirm the judicial commissioner's order in this respect. The reference to the equitable charge was therefore deleted."

It is not uncommon for caveat and injunction to exist side by side. Together, they give a complete safeguard. In *Walsh* v. *Alexander*[5] where the defendant agreed to sell the plaintiff a certain homestead selection but subsequently repudiated the agreement, an order for specific performance was made and an injunction in terms was also granted. On appeal Barton A.C.J. said at p. 303:

"It is urged that the respondent's caveat sufficiently protects him, and therefore he cannot have an injunction. I do not agree. The caveat does not give the purchaser relief as comprehensive or as direct as he gains by the jurisdiction *in personam*, and therefore it cannot be held to be the exclusive remedy ...

Isaacs J. put it in another way at p. 305:

"... Mr. Loxton argued that as the legislature has provided for a caveat which effectually prevents a 'dealing' being registered contrary to the agreement, that ousts the ordinary jurisdiction of the court to grant an injunction. There are two answers to that. The narrow one is that a dealing by way of transfer or lease or mortgage is not the only method of transgressing the contract. Retention and user and alteration of the property by the defendant himself could not be prevented by a caveat, and these are equally within the dominion claimed by him. But the broader ground is this: that where rights and liabilities are not created by a statute, but arise by common law, then, even though they are affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed by common law, yet, unless the statute expressly or by necessary implication excludes the common law remedy, the latter still remains."

In the light of the view we took on the matter, we do not think it necessary to deal with the other points raised. We are satisfied that the learned judge has no jurisdiction to alter the Privy Council's decision. Hence, we allowed the appeal.

*Appeal allowed.*

Solicitors: *Gan Teik Chee & Ho; Maxwell, Kenion, Cowdy & Jones.*

## LAU YEOK LIN & ORS. v. HIP SOON ENGINEERING & CONSTRUCTION SDN. BHD.

**[A.C.J. (Lamin Mohamed Yunus J.) 15 March 1988]**

**[Kuantan – Civil Suit No. 22-35-87]**

*Civil Procedure – Order for attachment before judgment – Setting aside of order – Power of Registrar – Merits of application – R.H.C. 1980, O. 32 r. 9.*

*Civil Procedure – Affidavit dated before date of writ – Difference of one day – Whether affects validity of affidavit.*

The plaintiffs agreed with the defendants for the purchase of certain equipment from the defendants. The plaintiffs made certain payments in accordance with the agreement. However, the plaintiffs were able to take delivery of only about half of the equipment and they were prevented from taking delivery of the rest of the equipment. They sued the defendants and prayed, *inter alia*, for an order for attachment before judgment of the remaining equipment. The application was made under Order 74 rule 5. The learned Senior Assistant Registrar heard the application and granted the order. The defendants applied to set aside the order but failed. They appealed. The defendants raised three grounds, namely:

(a) they objected to the Senior Assistant Registrar making the order on the ground that she had no power to do so;

(b) the affidavit of the plaintiffs in support of his application for attachment before judgment was not valid on the ground that it was dated earlier than the issue of the writ; and

(c) the proceedings were misconceived.

**Held**, dismissing the defendants' appeal: (1) in view of the provisions of the law and in the light of the decision in *Hwang Ju-in* v. *Huang Han Chao*,[1] the court cannot agree with the defendants that the Senior Assistant Registrar had no power to grant the order;

(2) as for the second ground, the difference was only one day and that did not affect the validity of the affidavit;

(3) as for the third ground, the plaintiffs are at liberty to choose any form of redress.

*Cases referred to:*

(1) *Hwang Ju-in* v. *Huang Han Chao* [1977] 2 M.L.J. 229 (apprvd).
(2) *H. Stacey* v. *Diamond Metal Products & Anor.* [1935] M.L.J. 249 (distd).
(3) *The "Sri Melati"* [1976] 1 M.L.J. 283 (refd).
(4) *Ong Heok & Anor* v. *Ooi Bee Tat & Ors.* [1982] 2 M.L.J. 326 (apprvd).

APPEAL AGAINST REGISTRAR'S DECISION.

*Jaya Ramachandran* for the plaintiffs/respondents.

*Anthony Fernandez* for the defendants/appellants.

*Cur. Adv. Vult.*

**Lamin Mohamed Yunus J.**: Briefly, the facts of this case were that the plaintiffs, a second-hand dealer, entered into an oral agreement on or about 21 September 1987 with the defendants for the purchase of second-hand equipment from the defendants for the price of $120,000 with the condition that the plaintiffs were required to sell back to the defendants certain specified equipment for a price of $10,000. The terms of payment in respect of the $120,000 purchase were reduced into writing (ex. A.1 to enc. 2). When the plaintiffs had taken delivery of about 50% of the equipment, they were prevented from taking further delivery of the remaining equipment. The plaintiffs then sued the defendants and prayed, *inter alia,* for an order for attachment before judgment of the remaining equipment. Before filing the suit, the plaintiffs made various payments in the course of taking delivery of the equipment and the last was by a cheque dated 6 November 1987. After failing to take delivery of the remaining equipment, the plaintiffs received information that the equipment had been removed from the factory premises to a store and subsequently some of them were sold. They then applied to this court *ex parte* for attachment before judgment under Order 74 rule 5 (enc.2). The Senior Assistant Registrar heard the application and granted the order on 13 November 1987. Subsequently the defendants applied to set aside the order (enc.7) but failed before the Senior Assistant Registrar. They now appeal against that decision on three grounds:

(a) firstly, they object to the Senior Assistant Registrar making the order on the ground that she had no power to do so;

(b) secondly, the affidavit of the plaintiff in support of his application for attachment before judgment was not valid on the ground that it was dated earlier than the issue of the writ;

(c) thirdly, the proceedings were misconceived.

On the first objection, I find that in view of the provisions of the law and in the light of the decision in the Singapore case of *Hwang Ju-in* v. *Huang Han Chao*[1] I cannot agree with the contention of learned counsel for the applicants/defendants that the Senior Assistant Registrar had no power to grant the order as applied for. It is quite clear to me that by virtue of Order 32 rule 9 the Senior Assistant Registrar has the power to deal with matters under the Debtors Ordinance 1957, in particular that as laid down under Order 74 rule 5(1) of the Rules of the High Court 1980 (R.H.C. 1980) because there is no direction by the Chief Justice that she is not to exercise the powers under the said Order 74 rule 5(1) or that it shall only be exercised by the judge in person or personally. Order 32 rule 9 of R.H.C. 1980 stipulates:

"The Registrar shall have power to transact all such business .. as ... may be transacted and exercised by a judge in chambers except such business .. as the Chief Justice may from time to time direct to be transacted. .. by a judge in person or as may by any of these rules be expressly directed to be transacted. .. by a judge in person."

The rule does not say that the Registrar "shall transact" and therefore rule 9 simply means that the Registrar can exercise those powers as given to a judge in chambers. A judge still retains all those powers as designated being those of "a judge in chambers". It is only when the Chief Justice directs that in certain specified matters the judge himself must attend or hear them that the Registrar will be precluded from exercising his powers. I think Order 32 rule 9 was made for reasons of convenience in that, for instance, when the Registrar for some reason is unable to attend to a particular case, then the case will be put before a judge.

The next objection is in regard to the validity of the affidavit in support of the application for attachment before judgment filed by the plaintiffs (enc.2). The affidavit in support was dated 12 November 1987 while the writ was dated one day after, that is, 13 November 1987. Learned counsel for the applicants/defendants contended that the affidavit being sworn and dated one day earlier cannot be treated as being valid on the authority of the case of *H. Stacey* v. *Diamond Metal Products and Anor.*[2] and therefore urged me to reject it in entirety and accordingly to set aside the order made by the Senior Assistant Registrar. In the *Stacey* case, Terrell J. was dealing with a situation where an affidavit of one Hunter, endorsed upon a letter written by him, was dated 12 July 1934 while the writ to the action that was going for trial was dated 10 August 1934, a difference of a little under one month. As Hunter had already died by the time the writ was issued, the question was whether his affidavit can be accepted in evidence under Order 35 rule 1(2) which provided that an order could be made that "any particular facts or facts may be proved by affidavit or that the affidavit of any witness may be read at the hearing or trial on such conditions as the court or the judge thinks reasonable." Learned counsel submitted that *Stacey's* case was in his favour and quoted the judgment of the court:

"The argument, however, that no affidavit can be sworn in an action which has not yet been commenced is on a different footing. This is more than an irregularity and

makes the affidavit *qua* affidavit entirely inadmissible. Certainly there may be cases in which an affidavit sworn a day or two previously, or even affidavits which have not been sworn, have been used on interlocutory applications, on counsel's undertaking that the affidavit shall be re-sworn or sworn and filed as the case may be. But when the strict rules are relaxed in such instances the principle is not sacrificed, as the court acts on the assumption that counsel's undertaking will be honoured, and when that has been done the requirement of the court's practice has been fully complied with."

In *Stacey's* case, the element of the death of Hunter was of primary consideration and therefore the question of non-availability of witness became the subject for substantial discussion. The court said:

"Hunter's letter therefore is *prima facie* inadmissible as an affidavit in these proceedings and as he is dead it never can become admissible by being resworn.

Even if from any point of view it could be treated as an affidavit in an intended action there is still the fatal objection that the plaintiff has never had the opportunity of cross-examining Hunter."

In the *Sri Melati* case,[3] the learned judge distinguished *Stacey's* case. He said (p. 285):

"In *Stacey's* case the affidavit was to be used to prove facts at a trial at which issues were to be adjudicated on and the deponent was dead. In this case no such facts were being proved. The affidavit was in support of a request for a warrant of arrest of a vessel in an admiralty action. Both the affidavit and the request for warrant were filed, according to the court records, after the filing of the writ. The trial of the issues are not before the court. (The law only requires that the warrant of arrest should be issued after the issue of writ.) The deponent is always available for cross-examination but no application has been made to do so."

I am unable to accept the contention of learned counsel that Arulanandom J. was wrong in his interpretation of *Stacey's* case on the ground that he relied on the element of the death of the deponent. The death of the deponent (Hunter) was relevant and a material point to be considered as it was a case which required the production of evidence at a trial.

As regards the date of the affidavit, the learned judge saw nothing improper as it had been filed according to the rules. In the present case before me, the difference was only one day. In fact, the affidavit was sworn on the afternoon of 12 November 1987 and the statement of claim accompanying the writ was dated the same day. The writ was filed in the registry on the following day, *i.e.* the 13th. If, in the present case, it is insisted upon that there was still that difference of one day, I am of the view that it did not affect its validity unless it can be shown that it is improper which learned counsel for the applicants/defendants had not done. Similarly in the case of *Ong Heok & Anor.* v. *Ooi Bee Tat & Ors.*[4] the affidavit in support of the application for injunction was sworn one day before the issue of the writ, and the learned judge did not find it improper. Also in the present case the question of non-availability of witness did not arise as he was available for cross-examination if requested for.

The third objection by learned counsel for the applicants/defendants was that the action taken by the respondents/plaintiffs by applying for attachment was misconceived or improper. He maintained that the respondents/plaintiffs should have injuncted the applicants/defendants from removing his equipment from the factory. The respondents/plaintiffs, according to him, was not justified on the facts to proceed under section 19 of the Debtors Ordinance 1957. In my view they are at liberty to choose any form of redress. Also, from the facts as deposed, I find that the respondents/plaintiffs have satisfied section 19(1)(c). The applicants/defendants had removed some of the goods from the factory and this was admitted and some he had even sold.

In the circumstances, I dismiss the appeal with costs.

*Appeal dismissed.*

Solicitors: *Balendran Chong Haranay & Bodi; Anthony Fernandez & Partners.*

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## PUBLIC PROSECUTOR v. ABDUL KUDUS BIN JAPLUS

**[O.Cr.J. (K.C. Vohrah J.) 11 March 1988]**

**[Kuala Lumpur – Federal Territory Criminal Trial No. 2 of 1984]**

*Criminal Law – Dangerous drugs – Trafficking in – Drugs found in cupboard in room – Accused's brother has access to room and cupboard – Whether defence story raises a reasonable doubt in the prosecution case – Dangerous Drugs Act 1952, s. 39B(1)(a).*

*Evidence – Evidence of statement leading to discovery of drugs – Explanation of – Evidence Act 1950, s. 27.*

*Evidence – Impeachment of credit of defence witness – Evidence Act 1950, ss. 145 & 155(1).*